RECORD AND BRIEF

No. 15-1500

Supreme Court, U.S.
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In The

Supreme Court of the United States

BRIAN LEWIS AND MICHELLE LEWIS,

Petitioners,

v.

WILLIAM CLARKE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Connecticut

BRIEF IN OPPOSITION

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QUESTION PRESENTED

May a plaintiff abrogate tribal sovereign immunity by suing a tribal entity and its employee, but then withdrawing his suit against the entity and proceeding solely against the employee in his "individual" capacity for tortious conduct that occurred while the employee was acting in the scope of his employment?

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BRIEF IN OPPOSITION

This Court "sparingly exercise[s]" its power to grant certiorari; *Camreta v. Greene*, 563 U.S. 692, 709 (2011); and there is no reason to use it in this case. The Petitioners' purported conflict is shallow, poorly-developed and one-sided; the decision below is consistent with the limits on the immunity of government officials; and this Court reaffirmed the breadth of tribal sovereign immunity a few Terms ago in *Michigan v. Bay Mills Indian Community*, ___ U.S. ___, 134 S.Ct. 2024 (2014).

First, there is no cert-worthy conflict among lower courts on this issue. In truth, only the Ninth Circuit has applied the "remedy-sought" approach. See *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013). The Tenth Circuit avoided "wad[ing] into th[e] swamp" of determining the "real party in interest" in the very case that the Petitioners cite. *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296-97 (10th Cir. 2008) (dismissing suit because "plaintiffs have failed to state a claim against the Individual Defendants in their individual capacities"). Moreover, unresolved tension *within* both Circuits belies the notion that this Court should intervene. See *Murgia v. Reed*, 338 Fed. Appx. 614 (9th Cir. 2009) (unpublished) (rejecting, as a matter of law, individual capacity suit against tribal police officers); *Burrell v. Armijo*, 603 F.3d 825 (10th Cir. 2010) (rejecting, as a matter of law, individual capacity suit against tribal official).

Indeed, only a handful of courts even have decided whether a tribal official or employee may be sued as an "individual" for tortious acts within the scope of his authority. Every court besides the Ninth Circuit has rejected attempts to plead around tribal immunity by doing exactly what the Petitioners did: slapping on an "individual capacity" label.[1] See, e.g., *Chayoon v. Chao*, 355 F.3d 141 (2d Cir.), *cert. denied sub nom.*, *Chayoon v. Reels*, 543 U.S. 966 (2004). As such, there is no "longstanding division in authority among the Courts of Appeals[,]" *DePierre v. United States*, 564 U.S. 70, 78 (2011), to resolve.

Second, the decision below does not conflict with this Court's sovereign immunity jurisprudence. The principal vehicle for individual capacity suits for money damages against government officials is 42 U.S.C. § 1983, which abrogates the immunity of any "person" who violates the rights of another under color of law. This distinction and the unique nature of the other exception to immunity on which the Petitioners lean – a *Bivens* action – make them both poor bedfellows for the decision below.

In addition, like all nations "that exercise inherent sovereign authority[,]" *Bay Mills*, 134 S.Ct. at 2030, the Mohegan tribal courts are a central feature of the Tribe's sovereignty. The Tribe has waived its immunity

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[1] Louisiana's intermediate appellate court is the only tribunal outside of the Ninth Circuit to apply the "remedy-sought" approach. See *Zaunbrecher v. Succession of David*, 181 So. 3d 885 (La. App. 2015), *writ denied sub nom.*, *Zaunbrecher v. David*, 187 So. 3d 1002 (La. 2016); Supreme Court Rule 10(b).

and that of its employees to tort suits in its courts. See Mohegan Tribe, Code of Laws § 3-21, et seq. The Petitioners had an "alternative way to obtain relief for off-reservation commercial conduct[,]" *Bay Mills*, 134 S.Ct. at 2036 n. 8, but they chose not to avail themselves of it. As with any sovereign – be it the Tribe, the United States or the state of Connecticut – this waiver exists at its sufferance. However, had the Petitioners tried to sue a federal or state employee for conduct in the scope of his employment, they would not have made it to first base. See 28 U.S.C. §§ 2679 & 2680; Conn. Gen. Stat. § 4-165.

This Court considered and rejected many of the Petitioners' policy arguments two years ago in *Bay Mills*. Indian tribes are immune, even for "suits arising from [their] commercial activities, [which] take place off Indian lands[,]" *Bay Mills*, 134 S.Ct. at 2031, and only Congress may abrogate that immunity. *Id.*; *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 758 (1998). In keeping with those principles, this Court should decline the Petitioners' invitation to follow the Ninth Circuit's uncertain and lonely lead and tread where Congress has not: the "remedy-sought" swamp, in which creative pleading trumps common sense.

STATEMENT OF THE CASE

On October 22, 2011, the Petitioners were in a car traveling south on Interstate 95 in Norwalk, Connecticut. Pet. App., 2a. The Respondent, an employee of the Mohegan Tribal Gaming Authority (MTGA), was driving a limousine that was behind the Petitioners' car. *Id.* The MTGA, which is a constitutional entity with governmental and proprietary powers; see Mohegan Const., Art. XIII, sec. 1; owned and had insurance for the limousine.[2] Pet. App., 2a-3a. The Respondent "was driving patrons of the Mohegan Sun Casino to their homes[,]" *id.* at 2a, when the limousine struck the rear of the Petitioners' car; the crash injured both Petitioners.[3] *Id.*

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[2] The MTGA oversees all gaming activity for the benefit of the Tribe; see Mohegan Const., Art. XIII; and the MTGA's profits are a mainstay of the Tribe's exercise of sovereignty: Both the Indian Gaming Regulatory Act and the Mohegan Tribal Code require the Tribe to use gaming revenues for the welfare of its members and the furtherance of its governmental activities. See 25 U.S.C. § 2710(b)(2)(B); Mohegan Tribe, Code of Laws § 2-21. The Code requires the Tribe to use the net revenues from Mohegan Sun "to strengthen its Tribal government[,]" and "to provide for the general welfare of its members. The Tribe shall ensure that these areas receive the necessary financial support from net gaming revenue prior to distributing such revenue for other purposes." Mohegan Tribe, Code of Laws § 2-181.

[3] The Petitioners assert that Mohegan Sun "is approximately 70 miles from Norwalk." Pet., 4. There is no evidence of this fact in the record, and this Court does not usually "adjudicate either legal or predicate factual questions in the first instance[,]" *CRST Van Expedited, Inc. v. E.E.O.C.*, ___ U.S. ___, 136 S.Ct. 1642, 1654 (2016), because it "is a court of final review and not first view[.]" *Id.* at 1654. More importantly, distance is a red herring: This

The Petitioners initially sued both the MTGA and the Respondent. *Id.* at 3a, 18a. Two days later, the Petitioners withdrew their claims against the MTGA and proceeded solely against the Respondent. *Id.* at 18a. The Petitioners then filed a two-count amended complaint against the Respondent as an individual. Pet. App., 18a-19a. The sole allegation of individual capacity was the word "individually," which the Petitioners affixed to the headings of the two counts. Opp. App., 1, 3.

The Respondent moved to dismiss the complaint based on tribal sovereign immunity. Pet. App., 3a, 19a. In opposition to the motion, the Petitioners relied solely on the "remedy-sought" approach announced in *Maxwell*, *supra*: They did not dispute that the Respondent was a tribal employee acting in the scope of his employment, or that the accident happened while he was working for the MTGA. *Id.* at 10a, 20a-22a. To the contrary, the Petitioners "themselves alleged that 'at all relevant times herein, [the Respondent] was acting in the scope of his employment with the [MTGA] and was driving said vehicle with the permission of the [MTGA] as its employee, agent or servant.'" *Id.* at 10a.[4]

The Connecticut Superior Court sided with the Petitioners and denied the motion to dismiss because "[u]nder the facts of this case . . . the 'remedy-sought'

Court twice has refused "to confine tribal immunity to suits involving conduct on reservations or to noncommercial activities." *Bay Mills*, 134 S.Ct. at 2031; see *Kiowa*, 523 U.S. at 758.

[4] The Petitioners also conceded that neither the MTGA, nor the Respondent, had waived immunity. Pet. App., 25a.

analysis should be applied and, because the remedy sought is not against the MTGA, [the Respondent] is not immune from suit." *Id.* at 25a. The Superior Court correctly started with the premise that, as a tribal entity, the MTGA enjoys the same immunity as the Mohegan Tribe itself, and "rejected the notion that it had the power to abrogate sovereign immunity." *Id.* However, relying on *Maxwell*, the Superior Court concluded that because the Petitioners sought damages "from [the Respondent] personally . . . [t]he essential nature and effect of the relief sought can mean that the sovereign is not the real, substantial party in interest." *Id.* at 27a. The Superior Court brushed aside the MTGA's statutory duty to indemnify the Respondent; see Mohegan Tribe, Code of Laws §§ 4-52 & 4-53; and the similar obligation under the MTGA's insurance policy, as mere "voluntary undertaking[s]". Pet. App., 34a-35a. As such, the Court found "no implication of tribal sovereign immunity such that [the Respondent], a tribal employee sued in his individual capacity, is immune from suit." *Id.* at 36a.

The Connecticut Supreme Court unanimously reversed and directed the entry of judgment for the Respondent. The Court began where *Bay Mills* begins: Immunity from suit is a "core aspect[] of sovereignty[,]" and "a necessary corollary to Indian sovereignty and self-governance." Pet. App., 8a (quoting *Bay Mills*, 134 S.Ct. at 2030). As such, Congress must "unequivocally express" its intent to abrogate tribal immunity; this high bar "reflects an enduring principle of Indian law: Although Congress has plenary authority

over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." Pet App., 9a (quoting *Bay Mills*, 134 S.Ct. at 2031-32).

Mindful of this caution and deference, the Connecticut Supreme Court followed the widely-accepted rule that "tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority." Pet. App., 10a. As has nearly every other court to consider the issue, the Court refused to allow the Petitioners' choice to label their suit as an "individual capacity" claim "to affect tribal immunity [as that] would eviscerate its protections and ultimately subject tribes to damages actions for every violation of state or federal law." *Id.* at 12a-13a (quoting *Bassett v. Mashantucket Pequot Museum & Research Ctr., Inc.*, 221 F.Supp.2d 271, 280 (D. Conn. 2002)). Instead, the Court employed "the sounder approach . . . to examine the actions of the individual tribal defendants[,]" Pet. App., 13a, about which the Petitioners had left nothing to assume: Their complaint alleged, and the "undisputed facts establish[ed,] that the [Respondent] was acting within the scope of his employment when the accident that injured the [Petitioners] occurred." *Id.* at 10a. Finally, the Court "reject[ed] the [Petitioners'] invitation to apply *Maxwell*[,]" *id.* at 14a, because *Maxwell* involved allegations of gross negligence, which "are often deemed to be outside the scope of employment and, therefore, not subject to sovereign immunity." *Id.*

REASONS FOR DENYING THE PETITION

I. The shallow, poorly-developed and overwhelmingly one-sided conflict among lower courts does not merit certiorari.

This Court does not grant certiorari unless "there is a *real and embarrassing* conflict of opinion and authority between the Circuit Courts of Appeals." *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955) (emphasis added). The "conflict" in this instance hardly merits the use of the word: It pits the Ninth Circuit against every state supreme court and federal appellate court (and every intermediate appellate court except one, see *supra*, n. 1) actually to decide the "remedy-sought" issue – and the law is not clear even in the Ninth Circuit. Furthermore, despite the "486 tribal gaming operations in 28 states[,]" Pet., 24, only a dozen or so decisions actually address the issue. This shallow, poorly-developed and overwhelmingly one-sided conflict is not worthy of review. See Supreme Court Rule 10; John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982) ("judicial restraint teaches us that patience in the resolution of conflicts may sometimes produce the most desirable result").

A. A plaintiff may not plead around tribal immunity by affixing an "individual capacity" label to a suit over a tribal employee's tortious conduct that occurred while he was acting in the scope of his employment.

It is well-settled that "tribal sovereign immunity has been extended to tribal officers acting in their representative capacities and within the scope of their authority." *Wright v. Prairie Chicken*, 579 N.W.2d 7, 9 (S.D. 1998); see *Inquiry Concerning Complaint of Judicial Standards Comm'n v. Not Afraid*, 245 P.3d 1116, 1120 (Mont. 2010); *Wright v. Colville Tribal Enter. Corp.*, 147 P.3d 1275, 1280 (Wash. 2006), *cert. dismissed*, 550 U.S. 931 (2007). This is true, too, for "employees of the [t]ribe when the complaint concerns actions taken in defendants' official or representative capacities and the complaint does not allege they acted outside the scope of their authority." *Chayoon*, 355 F.3d at 143; accord *M.J. ex rel. Beebe v. United States*, 721 F.3d 1079, 1084 (9th Cir. 2013).

The label that a plaintiff chooses to attach to a tribal employee does not determine whether the employee is immune from suit. "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Courts "[l]ook[] through forms of words to the substance of the complaint," *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 477 (1982), because "distinguishing between . . .

claims based on the particular label affixed to them would elevate form over substance and allow parties to evade [tribal immunity] simply by relabeling their . . . claims[.]" *Aetna Health Inc. v. Davila*, 542 U.S. 200, 214 (2004);[5] see *Cahill v. New York, N. H. & H. R. Co.*, 351 U.S. 183, 188 (1956) (Black, J., dissenting) ("[t]he substance of the pleadings and not their labels should govern our action").

The determinative factor is whether the employee acted in the scope of his employment; otherwise, litigants could "circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in defendants' official or representative capacities[.]" *Chayoon*, 355 F.3d at 143; see *Gooding v. Ketcher*, 838 F.Supp.2d 1231, 1246 (N.D. Okla. 2012) ("claimants may not simply describe their claims against a tribal official as in his 'individual capacity' in order to eliminate tribal immunity"); *Young v. Duenas*, 262 P.3d 527, 531 (Wash. App. 2011), *rev. denied*, 272 P.3d 851 (Wash. 2012), *cert. denied sub nom.*, *Young v. Fitzpatrick*, ___ U.S. ___, 133 S.Ct. 2848 (2013) (ellipses in original) (affirming dismissal as nothing "suggests [tribal officers] acted in their individual capacity[,]" so "[p]laintiffs . . . cannot circumvent tribal immunity through a mere pleading device").

Chayoon is a prime example of the wisdom of that rule. Mr. Chayoon attempted the same end-run around

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[5] *Aetna* involved relabeling claims in order to avoid ERISA preemption, but the principle is the same.

tribal immunity as the Petitioners, albeit by a longer road: He first sued the Mashantucket Pequot Tribal Nation and Foxwoods Casino in federal court for claimed violations of Connecticut's Family Medical Leave Act, but the court dismissed his suit based on tribal immunity. See *Chayoon v. Sherlock*, 877 A.2d 4 (Conn. App.), *cert. denied*, 888 A.2d 83 (Conn. 2005), *cert. denied*, 547 U.S. 1138 (2006) (describing history of litigation); see Docket Sheet in 3:02-cv-0163 (AVC), available at https://ecf.ctd.uscourts.gov/cgi-bin/DktRpt.pl?631370492747471-L_1_0-1 (web-site last visited 8/17/15).

Chayoon then sued seventeen individual defendants and the "Foxwoods Management Team" in federal court for the same claimed violations. 877 A.2d at 6; see Docket Sheet in 3:02-cv-1358 (AVC), available at https://ecf.ctd.uscourts.gov/cgi-bin/DktRpt.pl?118541761201346-L_1_0-1 (website last visited 8/17/15). In his second suit, Chayoon did exactly what the Petitioners did: He named the defendants as individuals, even though all seventeen held "positions on the Mashantucket Pequot Tribal Council or are officers and/or employees of Mashantucket Pequot Gaming Enterprise," and his "complaint concerns actions taken in defendants' official or representative capacities and . . . does not allege they acted outside the scope of their authority." 355 F.3d at 143. The Second Circuit rejected Chayoon's attempt to circumvent tribal immunity. *Id.*

Finally, Chayoon tried his luck in state court – and his pleading strategy again mirrored the Petitioners': Chayoon named "eight individuals who are or formerly

were employed by the Mashantucket Pequot Gaming Enterprise at Foxwoods" as defendants, 877 A.2d at 6 n. 1, and alleged "that the individual defendants are being sued in their 'personal' capacities as well as in their 'professional' capacities . . . [and] that because the defendants violated the FMLA, they necessarily acted beyond the scope of their authority and in their individual capacities." *Id.* at 9. The Connecticut Appellate Court rejected Chayoon's "argu[ment] that the defendants are not immune from suit because they . . . were being sued individually," *id.* at 7, and pointed out that his complaint

> patently demonstrates that in terminating the plaintiff's employment, *the defendants were acting as employees of Foxwoods within the scope of their authority*. It is insufficient for the plaintiff merely to allege that the defendants violated federal law or tribal policy in order to state a claim that they acted beyond the scope of their authority. . . . Such an interpretation *would eliminate tribal immunity from damages actions* because *a plaintiff must always allege a wrong* or a violation of law in order to state a claim for relief. In order to circumvent tribal immunity, the plaintiff must have alleged and proven, apart from whether the defendants acted in violation of federal law, that the defendants acted without any colorable claim of authority. . . . The plaintiff has made no proffer of such conduct here. The plaintiff merely has alleged that *he sued the defendants in their personal*

> *capacities* and that they acted outside of their authority.

Id. at 9-10 (emphasis added; internal citations and quotation marks omitted).

Other decisions echo the *Chayoon* cases' abhorrence for misleading labels. See *Gooding*, 838 F.Supp.2d at 1246; *Young*, 262 P.3d at 531; *Bassett*, 221 F.Supp.2d at 280 (plaintiffs "may not simply describe their claims against a tribal official as in his 'individual capacity' in order to eliminate tribal immunity"); *Wright*, 579 N.W.2d at 9 ("[t]he defense of sovereign immunity may not be evaded simply by suing officers in their individual capacity"). Still others simply reject individual capacity claims with little discussion. See *Oberloh v. Johnson*, 768 N.W.2d 373, 376-77 (Minn. App. 2009) (reversing denial of tribal treasurer's motion for summary judgment because he "was acting within the scope of his authority" when he mailed allegedly defamatory tribal newsletters); *Koke v. Little Shell Tribe of Chippewa Indians of Montana, Inc.*, 68 P.3d 814, 817 (Mont. 2003) (rejecting claim that "tribal officials . . . acting in their official capacities" were "liable for [those] actions in their individual capacities").

The Petitioners' amended complaint epitomizes the elevation of form over substance: The sum of their allegations that the Respondent acted in an individual capacity is a single word: "individually," which they added to the headings of the two counts after they withdrew as to the MTGA. Opp. App., 1, 3. Like *Chayoon* and its compatriots, the Connecticut Supreme Court's

unanimous decision refuses to allow the Petitioners to escape the consequences "when the[ir] complaint concerns actions taken within the scope of [a tribal employee's] duties and the complaint does not allege, nor have the [Petitioners] offered any other evidence, that he acted outside of the scope of his authority." Pet. App., 16a-17a. This outcome fairly holds the Petitioners to the substance of their own allegations.

B. The Tenth Circuit has not actually held that a tribal employee may be sued in his individual capacity for tortious conduct that occurred while he was acting in the scope of his employment.

In an attempt to generate smoke where there is no fire, the Petitioners contend that "[t]he Ninth and Tenth Circuits have held that tribal sovereign immunity does not apply to individual-capacity damages actions." Pet., 7. This misstates the law in the Tenth Circuit, which is, at best, a mixed bag.

As the Petitioners fleetingly acknowledge, Pet., 11, the Tenth Circuit reversed the denial of a tribal official's motion for judgment as a matter of law – two years *after Native Am. Distrib.*, *supra* – because there was no evidence that he had acted outside the scope of his authority. *Burrell*, *supra*, 603 F.3d 825. *Burrell* explains that while "immunity does not extend to an official when the official is acting as an individual or outside the scope of those powers that have been delegated to him . . . [t]he immunity question hinges on the

breadth of the official power the official enjoys and not whether the official is charged with using that power tortuously or wrongfully." *Id.* at 832. In other words, absent evidence that a tribal official or employee has acted outside the scope of authority given to him by the tribe, he cannot have acted as an individual. *Id.* at 832-36.

Burrell cites *Native Am. Distrib.* once (for the black-letter principle that "federally-recognized Indian tribes possess immunity from suit[,]" *id.* at 832), but does not discuss or distinguish it. Given that the two cases look in opposite directions, this Court should allow the Tenth Circuit to clean its own house rather than wielding the broom itself.[6]

Moreover, the *Native Am. Distrib.* decision consciously sidesteps the very holding that the Petitioners attribute to it. In that case, a tobacco distributor sued the Seneca-Cayuga Tribe, the Seneca-Cayuga Tobacco Company, and three of the Company's officers for breach of contract and civil conspiracy. 546 F.3d at

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[6] The Petitioners claim that "more recently [than *Burrell*] the Tenth Circuit has continued to apply the rule set out in *Native American Distributing*, see *Sanders v. Anoatubby*, 631 Fed. Appx. 618, 622 n. 9 (10th Cir. 2015) [(unpublished)]." Pet., 10. *Sanders* does nothing of the sort. Though *Sanders* mentions the "remedy-sought" discussion in *Native Am. Distrib.*, like its purported progenitor, it *affirms* the dismissal of a suit against tribal officials based on tribal immunity. 631 Fed. Appx. at 622-23. Indeed, the plaintiff in *Sanders* "d[id] not dispute that the Division and the tribal officer defendants are entitled to tribal sovereign immunity[,]" *id.* at 621-22, because she did not "quarrel with the [District Court's] expressed conclusion that this is an official capacity suit." *Id.* at 622 n. 9.

1290-91. The District Court dismissed the suit based on tribal immunity. *Id.* at 1291-92.

The Tenth Circuit affirmed. *Id.* at 1290. It disagreed with the District Court that the officers were entitled to immunity merely "[b]ecause all the allegations in the complaint related to actions that [they] took in their official capacities," *id.* at 1296, but did not *hold* "that tribal sovereign immunity . . . does not apply to individual-capacity damages actions." Pet., 9. The Tenth Circuit noted "that tribal officials are immunized from suits brought against them *because of* their official capacities[,]" 546 F.3d at 1296 (emphasis in original), and analogized tribal immunity to "sovereign immunity, [which] does not bar the suit so long as the relief is sought not from the sovereign's treasury but from the officer personally." *Id.* at 1297 (quoting *Alden v. Maine*, 527 U.S. 706, 757 (1999)).

However, this discussion – in essence, the "remedy-sought" approach – was *dicta*; the Tenth Circuit's actual holding follows it:

> We need not wade into this swamp, however, because a close reading of the plaintiffs' complaint makes clear that *plaintiffs have failed to state a claim against the [officers] in their individual capacities*. As a result, the claims asserted against the [officers] are subject to dismissal under Rule 12(b)(6), Fed.R.Civ.P. We therefore affirm the district court's dismissal

> of the claims against the [officers], albeit on different grounds.

546 F.3d at 1297 (emphasis added).[7]

It is axiomatic that "[t]his Court, like all federal appellate courts, does not review lower courts' opinions, but their judgments." *Jennings v. Stephens*, ___ U.S. ___, 135 S.Ct. 793, 799 (2015). In the certiorari context, "a federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues." *Rice*, 349 U.S. at 74. The actual holding of *Native Am. Distrib.* does not pose the conflict that the Petitioners posit; see *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 352 n. 12 (2005) ("[d]ictum settles nothing, even in the court that utters it"); and this Court's "function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial." *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) (dismissing certiorari as improvidently granted).

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[7] The Petitioners also cite *Fletcher v. United States*, 116 F.3d 1315 (10th Cir. 1997), which involved only claims for declaratory and injunctive relief. Pet., 10. *Fletcher* holds that tribal immunity barred the plaintiffs' official-capacity claims; *id.* at 1318, 1324-25; and also rejects the plaintiffs' individual-capacity claims because the "Indian Civil Rights Act speaks only to tribal action . . . and does not authorize a cause of action for declaratory or injunctive relief against either the Osage Tribe or its officers in federal court." *Id.* at 1324 n. 12.

C. The Ninth Circuit has reached contradictory results in tort suits against tribal officers and employees in their individual capacity.

The Ninth Circuit itself is Jekyll-and-Hyde on whether a plaintiff may sue tribal officials or employees as individuals for acts within the scope of their authority. As a consequence, the purported conflict does not "justify the exercise of our discretionary certiorari jurisdiction[.]" *Office of Senator Mark Dayton v. Hanson*, 550 U.S. 511, 515 (2007) (dismissing appeal and denying certiorari because decision of D.C. Circuit "is no longer in obvious conflict with any other Circuit").

The Ninth Circuit embraced the "remedy-sought" approach in *Maxwell*, *supra*, in which a shooting victim's family sued tribal paramedics for their "allegedly grossly negligent" treatment of the victim. 708 F.3d at 1080-81, 1090. The paramedics moved for summary judgment based on tribal immunity. *Id.* at 1081. The Ninth Circuit examined "whether the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the sovereign from acting, or to compel it to act." *Id.* at 1088. The Ninth Circuit upheld the denial of the paramedics' motion because the family had "sued [them] in their individual capacities for money damages. Any damages will come from their own pockets, not the tribal treasury." *Id.* at 1089.

The Ninth Circuit maneuvered around a pair of its own decisions to reach this result. See *id.* at 1088-89 (distinguishing *Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir. 2008), *cert. denied*, 556 U.S. 1221 (2009), and *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985)). Though *Maxwell* takes the view that these cases "do not question the general rule that individual officers are liable when sued in their individual capacities[,]" 708 F.3d at 1089, its analysis of *Hardin* does not hold water.[8]

In *Hardin*, the plaintiff sued "the [White Mountain Apache] Tribe, Tribal Court, Tribal Council, and various officials in their individual capacities, seeking declaratory and injunctive relief and damages on both constitutional and statutory grounds." 779 F.2d at 478. The opinion says nothing else about the capacity in which those officials were sued; it simply affirms the dismissal of the plaintiff's suit based on tribal immunity "[b]ecause all the individual defendants here were acting within the scope of their delegated authority." *Id.* at 479-80.

Maxwell acknowledges that "*Hardin* did not mention the remedy-sought principle . . . but it did not need to do so. *Hardin* was *in reality* an official capacity suit."

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[8] The Ninth Circuit recently employed the "remedy-sought" approach a second time. See *Pistor v. Garcia*, 791 F.3d 1104, 1115 (9th Cir. 2015) (tribal defendants not immune "because they are being sued in their individual capacities, rather than in their official capacities," and plaintiffs "seek[ ] money damages not from the tribal treasury but from the tribal defendants personally").

708 F.3d at 1089 (emphasis added). To prove this "reality," *Maxwell* betrays its own "remedy-sought" rule: It notes that *Hardin* does not

> (1) identify which officials were sued in their individual capacities or (2) the exact nature of the claims against them. But the use of the word "officials" suggests the plaintiff had sued high-ranking tribal council members for voting to eject him. *Holding the defendants liable for their legislative functions would therefore have attacked the very core of tribal sovereignty.*

Id. (emphasis added; quotation marks omitted). The highlighted sentence – while true – has nothing to do with the capacity in which the plaintiff sued those officials. Per *Maxwell*, the plaintiff chose that by the relief that he sought.[9] Indeed, that the plaintiff sought money damages from individual tribal officials for acts at "the very core of tribal sovereignty" emphasizes the foolishness of allowing a trick of pleading to trump the truth. *Hardin* recognized this danger, no matter the subsequent spin put on it by *Maxwell*.

Moreover, *Maxwell* overlooks *Murgia*, *supra*, which directly contradicts it. In *Murgia*, the plaintiff sued

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[9] Though *Maxwell* makes much of the purported failure to "identify which officials were sued in their individual capacities[,]" 708 F.3d at 1089, that is a red herring: *Hardin* states that the plaintiff sued "various officials in their individual capacities". 779 F.2d at 478. The obvious reading of that phrase is that the plaintiff sued *all* of the officials as individuals; if he had sued some officials as individuals and others not, the opinion likely would have distinguished between them.

two tribal police officers over the shooting death of another tribal member. 338 Fed. Appx. at 615. The officers were responding to a domestic disturbance at a home on tribal lands at the time of the shooting. *Id.* The District Court nonetheless "held that the Defendants were not entitled to sovereign immunity because the complaint named them in their individual capacities." *Id.* The Ninth Circuit curtly rejected the conclusion

> that tribal sovereign immunity did not apply solely because the Defendants were sued in their individual capacities. In our circuit, the fact that a tribal officer is sued in his individual capacity does not, without more, establish that he lacks the protection of tribal sovereign immunity. . . . If the Defendants were acting for the tribe within the scope of their authority, *they are immune from Plaintiff's suit regardless of whether the words "individual capacity" appear on the complaint.*

Id. at 616 (emphasis added; citation omitted).[10]

In addition, the Petitioners pooh-pooh the allegations of gross negligence in *Maxwell* as not "having anything to do with whether sovereign immunity applies to [tribal employees]." Pet., 13. An allegation of gross negligence is not an absolute bar to finding that an employee acted within the scope of his employment,

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[10] The Ninth Circuit remanded the case for further proceedings on whether the officers (1) were, in fact, acting within the scope of their authority, and (2) were acting as federal agents, not tribal agents, at the time. 338 Fed. Appx. at 616.

but, as the Petitioners' own authority notes, "[t]he employee's state of mind *will often be relevant to deciding whether he was acting within the scope of his employment* or had embarked on a frolic of his own; whether, for example, if he was a bill collector, he had struck the debtor in an effort to collect the debt owed his employer or had struck him out of personal malice." *Scottsdale Ins. Co. v. Subscription Plus, Inc.*, 299 F.3d 618, 621-22 (7th Cir. 2002) (emphasis added).

The plaintiffs in *Maxwell* sued under California law, 708 F.3d at 1081, which defines "[g]ross negligence . . . as either a 'want of even scant care' or 'an extreme departure from the ordinary standard of conduct.'" *City of Santa Barbara v. Superior Court*, 161 P.3d 1095, 1099 (Cal. 2007). This is a far cry from the Petitioners' own allegations, which describe adherence to a limousine driver's ordinary behavior on the job, not "an extreme departure" from it. In any event, the lack of clarity within the Ninth Circuit – which it could resolve in a future case via *en banc* consideration – obviates any need for this Court to intervene.[11]

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[11] The panel in *Maxwell* denied a petition for rehearing/rehearing *en banc*. 708 F.3d at 1079. No petition was filed in *Pistor*. See 791 F.3d at 1104.

II. There is no conflict between the decision of the Connecticut Supreme Court and limitations on the sovereign immunity of government officials.[12]

The Petitioners contend that "[s]overeign immunity bars suits seeking relief from the sovereign, not suits seeking relief only from the sovereign's employees." Pet., 14. However, a clear-eyed reading of this Court's precedents belies the Petitioners' claim that the Connecticut Supreme Court has "created a form of tribal immunity that is far broader than the comparable immunities applicable to States and the federal government." *Id.*

As the Petitioners admit, individual capacity suits for money damages are "most commonly brought under 42 U.S.C. [§] 1983[.]" Pet., 17. Such suits do not run afoul of sovereign immunity because of § 1983's use of the word "person". See *Hafer v. Melo*, 502 U.S. 21, 26 (1992). Section 1983 abrogates sovereign immunity, pursuant to Congress' authority under the Fourteenth Amendment, "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position. . . . Accordingly, it authorized suits to redress deprivations of civil rights by

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[12] Much of this section of the Petition addresses a non-issue: suits for declaratory or injunctive relief. Pet., 15-18. The decision below has no effect on the amenability of tribal officials and employees to such suits; they stand in the same shoes as their federal and state brethren. See *Bay Mills*, 134 S.Ct. at 2035 (emphasis in original) ("tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct").

persons acting under color of any state statute, ordinance, regulation, custom, or usage." *Id.* at 27; see *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 934 (1982) (brackets and quotation marks omitted) (Civil Rights Act "was passed for the express purpose of enforcing the [p]rovisions of the Fourteenth Amendment").

This waiver of immunity for individual capacity damages suits depends on the specific use of "person" in § 1983. As *Hafer* points out, "officers sued in their personal capacity come to court as individuals. A government official in the role of personal-capacity defendant thus fits comfortably within the statutory term 'person.'" 502 U.S. at 27. In short, government officials sued in their individual capacity are "persons" under § 1983 and cannot claim immunity. *Id.* at 28-29.

No statutory safe harbor exists in this case. The Petitioners brought an ordinary negligence action – not a claim that an official deprived them of their constitutional rights under the color of law – and Congress has not waived tribal immunity for such actions. Absent a statutory waiver of immunity, the result for a federal or state employee would be the same as for the Respondent: dismissal. See *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813-14 (1984); *Columbia Air Servs., Inc. v. Dep't of Transp.*, 977 A.2d 636, 642-43 (Conn. 2009) (exceptions to immunity of state officials and employees "are few and narrowly construed").

If the Respondent had been a federal or state employee, the Petitioners' own allegations would have

barred their suit. See 28 U.S.C. §§ 2679 & 2680; Conn. Gen. Stat. § 4-165. Once the Attorney General certifies that a federal employee was acting in the scope of his employment, immunity automatically attaches, the United States is substituted as a party, and the employee may not "again be pursued in any damages action arising from the same subject matter." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 422 (1995). State employees enjoy the same protection, but reach it by a slightly longer road. See *Martin v. Brady*, 802 A.2d 814, 817 (Conn. 2002) (question under § 4-165 "is whether the facts as alleged in the pleadings, viewed in the light most favorable to the plaintiff, are sufficient to survive a motion to dismiss on the ground of statutory immunity").

The Petitioners' only other example – a *Bivens* action – hardly strengthens their position. A *Bivens* action requires a constitutional violation by a government official, not merely negligent conduct within the scope of his job. See *Minneci v. Pollard*, ___ U.S. ___, 132 S.Ct. 617, 621 (2012). Moreover, this Court has been hostile to expanding the scope of permissible *Bivens* actions. See *id.* at 621-23 (enumerating claims that do not give rise to a *Bivens* action).

The Petitioners' last resort is a naked appeal to sympathy; they assert that "[t]he decision below will leave many plaintiffs who are injured by tribal employees without a remedy." Pet., 22. This point might carry more weight were the next paragraph not a discussion of the remedy *available* to plaintiffs injured by MTGA employees. *Id.* Tribal immunity does not deny relief to

people like the Petitioners; it merely requires them to seek it in a different forum: The Mohegan Gaming Disputes Court. See Mohegan Tribe, Code of Laws § 3-21 (establishing Gaming Disputes Court); *Kizis v. Morse Diesel Int'l, Inc.*, 794 A.2d 498, 505 (Conn. 2002) ("[t]he Mohegan Torts Code together with the gaming compact and the Mohegan constitution provide a forum and mechanism to redress the plaintiff's injuries").

The Tribe has adopted Connecticut's General Statutes and common law, to the extent that they do not conflict with tribal law, and the Gaming Disputes Court regularly adjudicates tort suits against the MTGA and its employees. Mohegan Tribe, Code of Laws § 3-52(a)(2). Though the Petitioners complain that "such a proceeding carries no right to a jury trial" or to recover punitive damages, this puts them in the *same* position, for instance, as persons who sue under the Federal Tort Claims Act. See 28 U.S.C. § 2402 ("any action against the United States under section 1346 shall be tried by the court without a jury"); 28 U.S.C. § 2674 (United States "shall not be liable for interest prior to judgment or for punitive damages").

Instead of suing in the Gaming Disputes Court, the Petitioners brought an action against the MTGA and the Respondent in state court and then withdrew almost immediately as to the MTGA. Pet. App., 18a. This sort of creative pleading is an improper end-run around tribal immunity. See *Chayoon*, 355 F.3d at 143; *Gooding*, 838 F.Supp.2d at 1246. If sanctioned, it will result in a stampede away from the Mohegan tribal courts. A functioning court system is a critical aspect

of sovereignty; reducing the efficacy of the Mohegan court system undermines the Tribe's sovereignty.

Finally, the Petitioners make much of the fact that the Gaming Disputes Court "exists only at the grace of the Tribe". Pet., 22. However, that is true for *every* waiver of sovereign immunity no matter the sovereign. The ability to sue under the Federal Tort Claims Act depends on the "grace" of Congress; Connecticut's legislature could eliminate the motor vehicle exception to sovereign immunity, Conn. Gen. Stat. § 52-556, at the drop of a hat. The dependent nature of a waiver of tribal immunity does not prove a conflict with this Court's jurisprudence; it emphasizes their consistency.

CONCLUSION

For the foregoing reasons, the Respondent respectfully asks this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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DOCKET NO.: KNL-CV13-6019099-S	SUPERIOR COURT
BRIAN LEWIS AND MICHELLE LEWIS	JD OF NEW LONDON
VS.	AT NEW LONDON
WILLIAM CLARKE	NOVEMBER 20, 2013

AMENDED COMPLAINT

COUNT ONE: (Brian Lewis vs. William Clarke, individually)

1. On or about October 22, 2011, at approximately 6:39 p.m., the plaintiff, Brian Lewis (hereinafter the "plaintiff" in this Count One), was the operator of a motor vehicle traveling southbound on Interstate 95 in Norwalk, Connecticut.

2. At the same time and place, the defendant, William Clarke, a resident of the State of Connecticut was operating a motor vehicle traveling behind the plaintiff, southbound on Interstate 95.

3. Suddenly and without warning, the defendant, William Clarke, drove the limousine into the rear end of the plaintiff's vehicle, the violent force of which caused that vehicle to propel forward, coming to rest partially on top of a jersey barrier located on the left hand side of the roadway (hereinafter the "collision").

4. Said collision and the injuries and damages as hereinafter set forth, were caused by the negligence and carelessness of William Clarke, in one or more the following ways, in that William Clarke:

a. violated Section 14-218 of the Connecticut General Statutes by operating a motor vehicle at an unreasonable rate of speed having regard for the time of day, intersection of street, width, traffic and use of such highway and the weather conditions;

b. violated Section 14-240 of the Connecticut General Statutes by operating said motor vehicle too close to the vehicle traveling in front of him;

c. failed to apply the brakes of the motor vehicle in a timely manner or otherwise maneuver a motor vehicle so as to avoid the collision with the vehicle in front of him;

d. failed to keep a motor vehicle under reasonable and proper control;

e. failed to keep an adequate and proper lookout ahead;

f. was inattentive to driving; and

g. failed under all the circumstances then and there existing to take reasonable and proper precautions to avoid the probability of harm to the plaintiff.

5. As a direct result of the collision, the plaintiff sustained the following injuries, some or all of which may be permanent in nature and will be the cause of future pain and disability, as well as fear of the same:

a. Loss of consciousness;

b. Lumbar sprain/strain;

c. Cervical sprain/strain; and

d. Post concussion syndrome

6. To treat said injuries, the plaintiff was required to seek emergency medical treatment, orthopedic treatment, follow-up treatment, physical therapy, radiological exams, and prescription pain killing medication.

7. As a result of said injuries the plaintiff has suffered and in the future will continue to suffer great physical and mental pain.

8. By reason of the negligence and carelessness of the defendant, as aforesaid, the plaintiff was required to spend substantial sums of money for the medical care, services, treatment, diagnostic studies, drugs and devices necessitated by said injuries.

9. As a result of said injuries the plaintiff has suffered and in the future will continue to suffer from a fear of future disability.

COUNT TWO: (Michelle Lewis vs. William Clarke, individually)

1. On or about October 22, 2011, at approximately 6:39 p.m., the plaintiff, Michelle Lewis (hereinafter the "plaintiff" in this Count Two), was the passenger of a motor vehicle traveling southbound on Interstate 95 in Norwalk, Connecticut.

2. At the same time and place, the defendant, William Clarke, a resident of the State of Connecticut

was operating a motor vehicle traveling behind the plaintiff, southbound on Interstate 95.

3. Suddenly and without warning, the defendant, William Clarke, drove the limousine into the rear end of the plaintiff's vehicle, the force of which caused that vehicle to propel forward, coming to rest partially on top of a jersey barrier located on the left hand side of the roadway (hereinafter the "collision").

4. Said collision and the injuries and damages as hereinafter set forth, were caused by the negligence and carelessness of William Clarke and the Mohegan Tribal Gaming Authority, in one or more the following ways, in that William Clarke:

a. violated Section 14-218 of the Connecticut General Statutes by operating a motor vehicle at an unreasonable rate of speed having regard for the time of day, intersection of street, width, traffic and use of such highway and the weather conditions;

b. violated Section 14-240 of the Connecticut General Statutes by operating said motor vehicle too close to the vehicle traveling in front of him;

c. failed to apply the brakes of the motor vehicle in a timely manner or otherwise maneuver a motor vehicle so as to avoid the collision with the vehicle in front of him;

d. failed to keep a motor vehicle under reasonable and proper control;

e. failed to keep an adequate and proper lookout ahead;

f. was inattentive to driving; and

g. failed under all the circumstances then and there existing to take reasonable and proper precautions to avoid the probability of harm to the plaintiff.

5. As a direct result of the collision, the plaintiff sustained the following injuries, some or all of which may be permanent in nature and will be the cause of future pain and disability, as well as fear of the same:

a. Nasal fracture;

b. Lumbar sprain/strain; and

c. Cervical sprain/strain.

6. To treat said injuries, the plaintiff was required to seek emergency medical treatment, orthopedic treatment, follow-up treatment, physical therapy, radiological exams, and prescription pain killing medication.

7. As a result of said injuries the plaintiff has suffered and in the future will continue to suffer great physical and mental pain.

8. By reason of the negligence and carelessness of the defendant, as aforesaid, the plaintiff was required to spend substantial sums of money for the medical care, services, treatment, diagnostic studies, drugs and devices necessitated by said injuries.

9. As a result of said injuries the plaintiff has suffered and in the future will continue to suffer from a fear of future disability.

WHEREFORE, the plaintiffs claim:

1. Monetary damages;

2. Such other relief as is within the jurisdiction of the Court.

THE PLAINTIFFS

BY /s/ James Harrington

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DOCKET NO.: KNL-CV13-6019099-S	SUPERIOR COURT
BRIAN LEWIS AND MICHELLE LEWIS	JD OF NEW LONDON
VS.	AT NEW LONDON
WILLIAM CLARKE	NOVEMBER 20, 2013

STATEMENT OF AMOUNT IN DEMAND

The amount, legal interest, or property in demand is fifteen thousand dollars or more, exclusive of interest and costs.

THE PLAINTIFFS

BY /s/ James Harrington

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CERTIFICATION

I hereby certify that a copy of the foregoing was mailed on this 20TH day of November, 2013, to the following:

Robert A. Rhodes, Esquire
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315 Post Road West
Westport, CT 06880

/s/ James Harrington
James M. Harrington, Esq.